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No.

In the Supreme Court of the United States

OCTOBER TERM, 1992

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

RICHARD H. SCHAEFER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

In this action for judicial review of the denial of a claim for Social Security disability benefits, the district court, in accordance with sentence four of 42 U.S.C. 405(g), reversed the Secretary's decision and remanded for further proceedings. The question presented is:

Whether, in light of *Sullivan* v. *Finkelstein*, 496 U.S. 617 (1990), and *Melkonyan* v. *Sullivan*, 111 S. Ct. 2157 (1991), the court of appeals correctly held that the district court's remand order was not a "final judgment" that triggered the 30-day period for filing an application for attorney's fees under the Equal Access to Justice Act, 28 U.S.C. 2412(d).

PARTIES TO THE PROCEEDING

Petitioner, the defendant below, is Louis W. Sullivan, the Secretary of Health and Human Services. Respondent, the plaintiff below, is Richard H. Schaefer.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Health and Human Services, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-2a) is unpublished, but the decision is noted at 960 F.2d 1053 (Table). The prior opinion of the court of appeals in *Welter* v. *Sullivan* (App., *infra*, 3a-8a), on which the court relied in this case, is reported at 941 F.2d 674. The opinions of the district court and reports of the magistrate (App., *infra*, 9a-12a, 13a-25a, 26a-27a, 28a-41a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 1992. On July 16, 1992, Justice Blackmun extended the time within which to file a petition for a writ of certiorari to and including August 15, 1992 (a Saturday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), provides in relevant part:

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party, * * * may obtain a review of such decision by a civil action * * *. The [district] court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. * * * The court may, on motion of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based.

2. The Equal Access to Justice Act (EAJA), 28 U.S.C. 2412, provides in relevant part:

> (d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action * * * brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.
>
> (B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought * * *. The party shall also allege that the position of the United States was not substantially justified. * * *
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> * * * * *
>
> (2) For purposes of this subsection—
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> * * * * *
>
> (G) "final judgement" means a judgment that is final and not appealable, and includes an order of settlement;
>
> * * * * *

STATEMENT

This case involves the timeliness of an application for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d), in an action for judicial review of the denial by the Secretary of Health and Human Services of a claim for Social

Security benefits. Specifically, it presents the question of when the 30-day period for filing an EAJA fee application commences in a case in which the district court reverses the Secretary's decision and remands the cause to the Secretary for further proceedings pursuant to sentence four of 42 U.S.C. 405(g). This Court's decisions in *Melkonyan* v. *Sullivan*, 111 S. Ct. 2157 (1991), and *Sullivan* v. *Finkelstein*, 496 U.S. 617 (1990), have already resolved that question: because such an order is an appealable "final judgment" under 28 U.S.C. 1291, the claimant must file an EAJA application within 30 days of when the time for taking an appeal of the remand order expires. The court of appeals in this case, however, disregarded those rulings. It held that such a remand order is *not* a final judgment, and that respondent's EAJA application—which was filed more than a year later, after proceedings on remand were completed—therefore was timely. Because *Melkonyan* and *Finkelstein* dispose of the question presented, we believe that summary reversal is warranted.

1. Under EAJA, a fee application must be filed "within thirty days of final judgment in the action." 28 U.S.C. 2412(d)(1)(B). The term "final judgment" means "a judgment that is final and not appealable." 28 U.S.C. 2412(d)(2)(G).

In *Melkonyan*, 111 S. Ct. at 2163-2165, and *Finkelstein*, 496 U.S. at 624-627, this Court recognized that there are two (and only two) kinds of remand orders in an action for judicial review under 42 U.S.C. 405(g). Sentence four provides that the district court "shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing."

The Court held in *Finkelstein* that such an order is a "final judgment" that is subject to immediate appeal pursuant to 28 U.S.C. 1291, even when it is accompanied by a remand order. 496 U.S. at 625, 629.

A district court also has authority, in limited circumstances, to remand a case to the Secretary pursuant to sentence six of 42 U.S.C. 405(g). Under the first clause of sentence six, the court may (1) remand the case to the Secretary for good cause before he files his answer, or (2) order, at any time, that additional evidence be taken before the Secretary, but only upon a showing that there is new and material evidence and that there is good cause for the failure to incorporate the evidence in the record in the prior proceeding. Because the district court retains jurisdiction during such a remand, the second clause of sentence six requires the Secretary to file with the court any additional or modified findings of fact or decision he renders on remand (along with a supplemental transcript), so that the district court may then render a final judgment in the case. See *Finkelstein*, 496 U.S. at 627-628. This case involves a remand order entered pursuant to sentence four, not sentence six, of 42 U.S.C. 405(g).

2. a. In June 1986, respondent filed an application for disability insurance benefits under Title II of the Social Security Act, 42 U.S.C. 401 *et seq.* His application was denied at all levels of the administrative appeals process, and he then sought judicial review pursuant to 42 U.S.C. 405(g). By order entered April 5, 1989, the district court "reversed" the Secretary's decision and remanded the case to the Secretary for further consideration in light of the court's order. App., *infra*, 26a-27a; see also *id.* at 28a-41a

(magistrate's recommendation).[1] The Secretary did not appeal that order. The docket sheet indicates that the district court case was then closed.

On remand to the Secretary, in a decision dated January 31, 1990, the ALJ found respondent disabled. That decision became final 60 days later, when the time for review by the Appeals Council expired. App., *infra*, 10a; see 20 C.F.R. 404.984.

b. On July 18, 1990, respondent filed an application in the district court for attorney's fees under EAJA.[2] The Secretary argued that the "final judgment" for purposes of EAJA was the district court's order of April 5, 1989, which reversed the Secretary's decision denying benefits and remanded to the Secretary for further proceedings. That order became final and not appealable on June 4, 1989, upon expiration of the 60-day period allowed by Fed. R. App. P. 4(a)(1) for taking an appeal. Consequently, the Secretary argued, respondent's EAJA application was untimely because it was filed more than a year later, rather than within 30 days, as 28 U.S.C. 2412 (d)(1)(B) requires. The Secretary pointed out that in *Melkonyan*, the Court had stated that in cases remanded to the Secretary pursuant to sentence four of 42 U.S.C. 405(g), "the filing period begins after the final judgment ('affirming, modifying, or reversing') is entered by the court and the appeal period has run, so that the judgment is no longer appealable." 111 S. Ct. at 2165.

[1] The district court concluded that the administrative law judge (ALJ) failed to evaluate respondent's subjective complaints of pain in accordance with Eighth Circuit precedent, that the ALJ did not properly analyze respondent's back injuries, and that the ALJ's assessment of respondent's residual functional capacity to engage in his past work was not supported by the medical evidence on the record as a whole. App., *infra*, 26a-27a.

[2] The district court's opinion erroneously states that the fee application was filed on July 17, 1990.

The district court rejected the Secretary's argument and held that respondent's fee application was timely. The district court found the timeliness issue in this case to be controlled by the Eighth Circuit's decision in *Welter* v. *Sullivan*, 941 F.2d 674 (8th Cir. 1991) (reproduced at App., *infra*, 3a-8a), which had been decided only 17 days earlier. *Welter* involved consolidated cases in which the district court had ordered remands to the Secretary pursuant to sentence four of 42 U.S.C. 405(g). After securing benefits on remand, each claimant applied for attorney's fees under EAJA, well in excess of 90 days after the remand orders were entered. Purporting to distinguish this Court's decision in *Melkonyan*, 111 S. Ct. at 2165, the Eighth Circuit held in *Welter* that the district court's orders, though governed by sentence four of 42 U.S.C. 405(g), were not "final 'judgment[s] . . . modifying or reversing the decision[s] of the Secretary'" within the meaning of that sentence. Instead, the court reasoned, "the district court retained jurisdiction of the claimants' cases and planned to enter dispositive sentence four judgments after the Secretary reevaluated the claimants' applications for benefits." App., *infra*, 5a. "Because the parties did not report to the district court after the Secretary awarded benefits to the claimants on remand," the court concluded, "no final judgments ha[d] been entered" and the EAJA applications were still timely. *Id.* at 6a.[3]

[3] Although the Eighth Circuit held that the fee applications in *Welter* were timely, it affirmed the district court's finding in each case that the government's position was substantially justified. App., *infra*, 6a-8a. Because the court of appeals'

The district court in the instant case determined that, under *Welter*'s analysis, "no final judgment ha[d] been entered" here as well, and that respondent's fee application therefore was still timely. App., *infra*, 12a. Proceeding to the merits of the application, the district court found that the position of the United States was not substantially justified, and it awarded respondent $1,372.50 in attorney's fees and $120 in costs under EAJA. *Id.* at 9a; see also *id.* at 17a-18a (magistrate's recommendation).[4]

c. The Secretary filed a notice of appeal and requested the court of appeals to consider the appeal en banc because *Welter* constituted binding circuit precedent on the timeliness issue. The court of appeals denied that motion. Thereafter, the panel, considering itself bound by *Welter*, held that respondent's fee application was timely, and it affirmed the district court's judgment in an unpublished per curiam opinion dated April 17, 1992. App., *infra*, 1a-2a.[5]

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judgments therefore were in favor of the Secretary, we did not seek review of the timeliness issue in this Court.

[4] The district court also held that respondent's counsel was entitled under Section 206(b)(1) of the Social Security Act, 42 U.S.C. 406(b)(1), to an award of attorney's fees out of respondent's past-due benefits. See *Bowen* v. *Galbreath*, 485 U.S. 74, 76 (1988). The court awarded counsel $2,287.50 in fees under that provision, subject to counsel's refunding to respondent the amount of fees awarded against the government under EAJA ($1,372.50), as required by Section 3 of the 1985 amendments to EAJA (Pub. L. No. 99-80, 99 Stat. 186, 42 U.S.C. 406(b)(1)). See App., *infra*, 9a; *id.* at 18a-24a (magistrate's recommendation). No question is presented here concerning the award of fees to counsel under 42 U.S.C. 406(b)(1), which was paid by respondent (out of his past-due benefits), not by the government.

[5] The Secretary did not challenge the district court's finding that the government's position was not substantially justified

REASONS FOR GRANTING THE PETITION

The Eighth Circuit's decision below (and in *Welter*) cannot be reconciled with this Court's decisions in *Melkonyan* v. *Sullivan*, 111 S. Ct. 2157 (1991), and *Sullivan* v. *Finkelstein*, 496 U.S. 617 (1990). Those two decisions have clearly resolved the question of when an EAJA application must be filed in a case such as this. The Eighth Circuit's ruling also squarely conflicts with that of the Fifth Circuit in *Luna* v. *Department of HHS*, 948 F.2d 169 (5th Cir. 1991). There, the Fifth Circuit correctly recognized that *Finkelstein* and *Melkonyan* require a claimant to file an EAJA application within 30 days of when a sentence four remand order becomes final and not appealable.

The issue presented by this circuit conflict is of broadly recurring importance in the federal courts, since thousands of Social Security cases are remanded to the Secretary each year. The Tenth Circuit has recently rendered a decision agreeing with the Eighth Circuit in *Welter*, see *Gutierrez* v. *Sullivan*, 953 F.2d 579 (10th Cir. 1992), and the same issue is pending in four other courts of appeals. Review by this Court therefore is plainly warranted. Because *Melkonyan* and *Finkelstein* dispose of the issue, however, we believe that plenary review is not necessary and that summary reversal would be appropriate.

1. a. In *Melkonyan*, this Court observed that the decision in *Finkelstein* identified two kinds of remands under 42 U.S.C. 405(g): "(1) remands pursuant to the fourth sentence, and (2) remands pursuant to the sixth sentence." *Melkonyan*, 111 S. Ct. at 2163 (citing *Finkelstein*, 496 U.S. at 624-627). Although in *Finkelstein* the Court "did not state explicitly * * *

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or the amount of the fees, and we likewise do not raise those issues here.

that these were the *only* kinds of remands permitted under the statute," it did so in *Melkonyan*. 111 S. Ct. at 2164. There, the Court held, in light of "Congress' explicit delineation in § 405(g) regarding the circumstances under which remands are authorized," that Congress "intended to limit the district court's authority to enter remand orders to these two types." *Ibid.*

There can be no contention here that the district court's 1989 order was entered pursuant to sentence six of 42 U.S.C. 405(g): the district court neither remanded for good cause on the Secretary's motion prior to filing his answer, nor directed the Secretary to receive new and material evidence based on a finding of good cause for the failure to include such evidence in the record when the matter was pending before the Secretary. Hence, the remand order could only have been entered pursuant to sentence four of 42 U.S.C. 405(g).

Sentence four provides that the district court "shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing." Thus, a remand pursuant to sentence four must accompany (and is ancillary to) a "judgment" affirming, modifying, or reversing the Secretary's decision on the merits. Sentence eight in turn provides that such a judgment "shall be *final* except that it shall be subject to review in the same manner as a judgment in other civil actions" (emphasis added). Based on this explicit statutory text, the Court held in *Finkelstein* that an order entered pursuant to sentence four of 42 U.S.C. 405(g) is a "final judgment" and may be appealed as such pursuant to 28 U.S.C. 1291, even if it is accompanied by an order remanding the cause

to the Secretary for further proceedings. 496 U.S. at 625, 629. The Secretary's decision on remand would then be subject to judicial review in a "separate piece of litigation" pursuant to 42 U.S.C. 405(g). *Finkelstein*, 496 U.S. at 624-625. Under *Finkelstein*, then, the district court's 1989 order was appealable by the Secretary, even though the order (in addition to reversing the Secretary's decision) remanded the cause to the Secretary for further proceedings. Neither the district court nor the court of appeals suggested otherwise.[6]

Under EAJA, a fee application must be filed within 30 days of the "final judgment" in the civil action, which is defined to mean a "judgment" that is "final and not appealable." 28 U.S.C. 2412(d)(1)(B) and (2)(G). As we have just explained, under sentence

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[6] This Court noted in *Finkelstein* that the order there was unquestionably a "judgment," because "it terminated the civil action challenging the Secretary's final determination that respondent was not entitled to benefits, set aside that determination, and finally decided that the Secretary could not follow his own regulations in considering the disability issue." 496 U.S. at 625. Similarly here, the district court's 1989 order terminated the civil action challenging the Secretary's final decision denying respondent's claim for benefits, "reversed" that decision, and finally decided that the ALJ had not properly evaluated respondent's allegations of pain or his back injuries and that the ALJ's assessment of respondent's ability to perform his past work was not supported by the medical evidence in the record as a whole. App., *infra*, 26a-27a.

It is irrelevant that the district court in this case did not label its 1989 order a "final judgment." "The label used by the District Court of course cannot control the order's appealability in this case, any more than it could when a district court labeled a non-appealable interlocutory order as a 'final judgment.' See *Liberty Mutual Ins. Co.* v. *Wetzel*, 424 U.S. 737 (1976)." *Finkelstein*, 496 U.S. at 628 n.7.

eight of 42 U.S.C. 405(g) and *Finkelstein*, the district court's April 5, 1989, order was a "final" judgment. That order became "not appealable" 60 days later, when the time for taking an appeal expired. Under the plain terms of EAJA, respondent then had 30 more days—until July 4, 1989—within which to file a fee application. The application he eventually filed on July 17, 1990, was more than a year out of time. *Melkonyan* unambiguously confirms this conclusion, for it states that "[i]n sentence four cases, the filing period begins after the final judgment ('affirming, modifying, or reversing') is entered by the court and the appeal period has run, so that the judgment is no longer appealable." 111 S. Ct. at 2165.

b. The court of appeals in this case nevertheless held—affirming the district court's EAJA award on the basis of *Welter*—that the district court's 1989 order was *not* a final judgment. App., *infra*, 2a, 12a. Instead, the court reasoned in *Welter* and this case that the district court "retained jurisdiction" for purposes of entering a final judgment after proceedings on remand were completed.[7] Because the parties had not reported to the district court after the Secretary awarded benefits on remand, the court further reasoned that no final judgment had yet been entered and that the fee application filed more than a year later was therefore still timely. App., *infra*, 5a-6a, 12a. This reasoning not only circumvents Congress's decision to impose a 30-day filing requirement under

[7] The remand order in this case, like that in *Welter*, did not expressly purport to retain jurisdiction. See App., *infra*, 27a. See also *Hafner* v. *Sullivan*, No. 91-1634 (8th Cir. Aug. 11, 1992), slip op. 5 (confirming that *Welter* applies even if the sentence four remand order does not "evidence an intent to retain jurisdiction").

EAJA, it also conflicts with the text of 42 U.S.C. 405(g), *Finkelstein*, and *Melkonyan*.

There is no suggestion in 42 U.S.C. 405(g) that a district court may "retain" jurisdiction in a case governed by sentence four for purposes of entering a "final judgment" after completion of proceedings on remand—so as to defeat the appealability of the order that remands the cause to the Secretary (and, as a consequence, to prevent the running of the 30-day EAJA filing period). To the contrary, as the text of 42 U.S.C. 405(g) makes clear (and as *Finkelstein* and *Melkonyan* confirm), a remand under sentence four must accompany a "judgment," and sentence eight deems such a judgment to be "final." 496 U.S. at 625, 629; 111 S. Ct. at 2164, 2165. The district court accordingly has no authority to postpone entry of a "final judgment" when it remands to the Secretary in circumstances such as these. The Court made that very point in *Finkelstein*, explaining (496 U.S. at 629):

> Rather, the fourth sentence directs the entry of a final, appealable judgment even though that judgment may be accompanied by a remand order. The fourth sentence does not require the district court to choose between entering a final judgment and remanding; to the contrary, it specifically provides that a district court may enter judgment "with or without remanding the cause for a rehearing."

Nor is there any provision in 42 U.S.C. 405(g) for the Secretary to "report" to the district court following completion of proceedings on a sentence four remand, as the courts below contemplated. App., *infra*, 6a, 12a. In this respect, sentence four stands in marked contrast to sentence six, which expressly

directs the Secretary to file the revised findings and decision he renders on remand (together with a supplemental transcript) with the district court, so that the court may enter a final judgment after reviewing the revised findings and decision, as provided by sentence seven of 42 U.S.C. 405(g).[*] The Court made clear in *Finkelstein* that no such filing requirement is imposed on the Secretary in sentence four cases. 496 U.S. at 625-626.

The Court in *Finkelstein* also specifically rejected the argument (which was essentially adopted by the Eighth Circuit here and in *Welter*) that in a sentence four case, "the district court may enter an appealable final judgment upon reviewing the Secretary's post-remand 'additional or modified findings of fact and decision.'" 496 U.S. at 626 (quoting sentence seven of 42 U.S.C. 405(g)). The Court explained that "[t]he postremand review conducted by the District Court under the seventh sentence refers to cases that were previously remanded under the sixth sentence." 496 U.S. at 626-627.

It was in light of this statutory scheme that the Court held in *Melkonyan* that "[i]n sentence six cases, the [EAJA] filing period does not begin until after postremand proceedings are completed, the Secretary returns to court, the court enters a final judgment, and the appeal period runs." 111 S. Ct. at 2165. By contrast, the Court made clear that in sentence four cases, the filing period begins after the order that includes the remand is entered by the district court and the period for appealing that order

[*] Sentence seven provides that "[s]uch additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision."

has run, with no postponement for completion of the administrative proceedings on remand. *Ibid.* The court of appeals obliterates this carefully drawn distinction between sentence four and sentence six remands.

c. Contrary to the view of the panel in *Welter*, its timeliness ruling was not justified by the fact that "the claimants did not become prevailing parties eligible for attorney's fees until the Secretary reevaluated their cases and awarded them benefits." App., *infra*, 6a (citing *Sullivan* v. *Hudson*, 490 U.S. 877, 887 (1989)). To be sure, the Court thought it "clear" in *Hudson* that "a Social Security claimant would not, as a general matter, be a prevailing party within the meaning of the EAJA merely because a court had remanded the action to the agency for further proceedings," and noted that "the vast majority of the Courts of Appeals have come to this conclusion." 490 U.S. at 887; accord, *Finkelstein*, 496 U.S. at 630; see also H.R. Rep. No. 120, 99th Cong., 1st Sess. 19 (1985) (report on 1985 amendments to EAJA) (noting that under EAJA case law, a claimant ordinarily had not been regarded as a prevailing party solely by virtue of obtaining a remand to the Secretary). And even before *Hudson*, this Court had repeatedly held that to be considered a prevailing party, the plaintiff must point to a resolution of the dispute that has changed the legal relationship between himself and the defendant. *Texas State Teachers Ass'n* v. *Garland Indep. School Dist.*, 489 U.S. 782, 792 (1989); *Hewitt* v. *Helms*, 482 U.S. 755, 760-761 (1987); see *Hudson*, 490 U.S. at 886-887.

The panel in *Welter* was wrong, however, in believing that, in order to give effect to this established "prevailing party" jurisprudence, it was necessary to hold that a district court remand order under sen-

tence four that contains a remand to the Secretary is not a "final judgment." App., *infra*, 6a. Rather, in sentence four remand cases, the 30-day filing period under EAJA begins to run after the final judgment of remand is entered and the appeal period has run, although a definitive determination of prevailing party status must await completion of the proceedings on remand. As a result, a claimant would be entitled to EAJA fees only if he files a fee application within 30 days after the remand order is no longer appealable, the Secretary awards benefits on remand, and the district court then finds that the government's position was not substantially justified.

Put another way, securing the reversal and remand from the district court is a necessary, but not a sufficient, condition for attaining prevailing party status. That element of prevailing party status must of course be satisfied when the claimant files an EAJA application. The remaining element (an award of benefits)—which is, in essence, a condition subsequent—may be satisfied later. This interpretation of the statutory scheme is both reasonable and practicable: it is fully consistent with both 42 U.S.C. 405(g) and EAJA; and it properly gives effect to both *Melkonyan* and *Finkelstein* on the one hand and the prevailing party jurisprudence endorsed in *Hudson* and *Finkelstein* on the other.

2. For a number of reasons, the Eighth Circuit's decision in this case plainly warrants review by this Court. First, it is flatly inconsistent with this Court's own decisions in *Finkelstein* and *Melkonyan*.

Second, the decisions in this case and *Welter* squarely conflict with *Luna* v. *Department of HHS*, 948 F.2d 169 (5th Cir. 1991). There, the Fifth Circuit held, relying on *Finkelstein* and *Melkonyan*,

that "every fourth-sentence remand order is a 'final judgment' * * * for purposes of the EAJA and section 405(g), and the EAJA's thirty-day time [begins] running at the point at which that final judgment [has] been entered and the period for appeal thereof [has] run." 948 F.2d at 171-172; see also *Frizzell* v. *Sullivan*, 937 F.2d 254, 256-257 (5th Cir. 1991). The Fifth Circuit therefore held in *Luna* that the 30-day filing period began to run upon expiration of the period for appealing the remand order, even though the district court in that case (unlike the district court here) *did* expressly purport to retain jurisdiction during the proceedings on remand and directed the parties to file status reports with the court. See 948 F.2d at 171.[9]

Third, the timeliness issue is of recurring importance. The Tenth Circuit has already rendered a decision agreeing with the Eighth Circuit in *Welter*, see *Gutierrez* v. *Sullivan*, 953 F.2d 579 (10th Cir. 1992),[10] and cases presenting the same issue are pend-

[9] The Fifth Circuit went on to hold in *Luna* that the 30-day filing period should be equitably tolled in the circumstances of that case, because the district court's remand order purported to retain jurisdiction, "thus unwittingly misleading Luna to think that no final judgment was being entered," and the Secretary had apparently acquiesced in the form of the remand order. 948 F.2d at 173. The Fifth Circuit observed, however, that "[p]rospective claimants, cognizant of *Frizzel* and [*Luna*], presumably could not make the same equitable claim." 948 F.2d at 173 n.5. There is no comparable predicate for an estoppel claim in this case either, even if we assume, *arguendo*, that the 30-day filing period is subject to equitable tolling.

[10] The Solicitor General has authorized the filing of a petition for a writ of certiorari in *Gutierrez*, which is now due on August 26, 1992. See also *Sparling* v. *Sullivan*, 785 F. Supp.

ing in four other circuits.[11] Moreover, because thousands of Social Security cases are remanded to the Secretary each year,[12] it is important to the sound and efficient administration of both the Social Security program and EAJA that there be clear rules for courts and litigants to follow regarding the filing of EAJA applications.

3. The answer to the question presented is supplied by the text of 42 U.S.C. 405(g) and EAJA and by this Court's own decisions in *Finkelstein* and *Melkonyan*. Because that answer is, in our view, quite clear—and because the Court has so recently and thoroughly addressed the operation of 42 U.S.C. 405(g) and EAJA in the context of remand orders—we do not believe that it is necessary for the Court to grant plenary review once again in this case. The Court need only reiterate what it said in *Melkonyan*: "In sentence four cases, the filing period begins after the final judgment ('affirming, modifying, or reversing') is entered by the court and the appeal period has run, so that the judgment is no longer appealable." 111 S. Ct. at 2165. Under that rule, respondent's EAJA application, which was filed more than

312, 316 (N.D.N.Y. 1992); cf. *Scanlon* v. *Sullivan*, No. 91-55516 (9th Cir. July 24, 1992), slip op. 8846-8847.

[11] See *Labrie* v. *Sullivan*, No. 92-1066 (1st Cir.); *Iker* v. *Sullivan*, No. 92-5233 (6th Cir.); *Engelbrite* v. *Secretary of HHS*, No. 91-16920 (9th Cir.); *Newsome* v. *Sullivan*, No. 91-8917 (11th Cir.).

[12] In 1989, the Appeals Council processed 6,432 remands. See Social Security Administration, *Annual Report to the Congress* 29 (Apr. 1990). In 1990, it processed 4,343 remands, Social Security Administration, *Annual Report to the Congress* 34 (May 1991), and in 1991, it processed 2,526, Social Security Administration, *Annual Report to the Congress* 38 (Apr. 1992).

one year after the district court's April 5, 1989, order was no longer appealable, was untimely. The judgment of the court of appeals therefore should be summarily reversed.

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment of the court of appeals should be summarily reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
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AUGUST 1992

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-3494MN

RICHARD H. SCHAEFER, APPELLEE

v.

LOUIS W. SULLIVAN, M.D., Secretary of Health and Human Services, APPELLANT

Appeal from the United States District Court for the District of Minnesota

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Submitted: April 14, 1992

Filed: April 17, 1992

Before FAGG, Circuit Judge, HENLEY, Senior Circuit Judge, and WOLLMAN, Circuit Judge.

PER CURIAM.

The Secretary of Health and Human Services appeals the district court's order awarding attorney's

fees to claimant Richard H. Schaefer under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d) (1988). We affirm.

After the Secretary denied Schaefer's initial application for disability benefits, Schaefer sought judicial review. Finding the Secretary's position was not supported by substantial evidence, the district court remanded the case to the Secretary on April 5, 1989 for further proceedings. On January 31, 1990, the Secretary awarded Schaefer benefits. Neither party returned to the district court until July 18, 1990, when Schaefer filed a motion for entry of judgment and an application for attorney's fees under EAJA. The Secretary argued Schaefer's fee application was untimely under *Melkonyan v. Sullivan*, 111 S. Ct. 2157 (1991). See 28 U.S.C. § 2412(d)(1)(B) (1988) (fee claimant must file application "within thirty days of final judgment in the action"). Relying on *Welter v. Sullivan*, 941 F.2d 674, 675-76 (8th Cir. 1991), the district court concluded a final judgment had not yet been entered and thus Schaefer's fee application was timely.

On appeal, the Secretary concedes *Welter* controls this case but contends *Welter* was wrongly decided. One panel of this court, however, cannot "disregard a precedent handed down by another panel. Only the [c]ourt en banc can take [this] action." *Drake v. Scott*, 812 F.2d 395, 400 (8th Cir.), *cert. denied*, 484 U.S. 965 (1987). Based on the Secretary's concession that *Welter* controls, we affirm the district court.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

Nos. 90-2559SI, 90-2725SI, 90-2836SI

EVELYN R. WELTER, APPELLANT

v.

LOUIS W. SULLIVAN, M.D., Secretary of Health and Human Services of the United States, APPELLEE

LEE D. BOOTON, APPELLANT

v.

LOUIS W. SULLIVAN, M.D., Secretary of Health and Human Services of the United States, APPELLEE

FRED G. LINT, APPELLANT

v.

LOUIS W. SULLIVAN, Secretary of Health and Human Services of the United States, APPELLEE

Submitted March 13, 1991
Decided Aug. 9, 1991
Rehearing and Rehearing En Banc
Denied Oct. 23, 1991

FAGG, Circuit Judge.

Evelyn R. Welter, Lee D. Booton, and Fred G. Lint (the claimants) appeal separate district court orders denying their applications for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d) (1988). Because the three appeals present common issues, we decide them in a single opinion. We affirm.

The claimants' applications seeking attorney's fees under EAJA are based on the claimants' successful pursuit of social security disability benefits. Initially, the Secretary of Health and Human Services denied each claimant's application for benefits. Following their losses at the administrative level, the claimants individually sought judicial review in the same district court. The district court concluded the Administrative Law Judges (ALJs) who had reviewed the claimants' applications for benefits either failed to: fully develop the record; include all of the claimants' relevant impairments in the hypothetical questions posed to the vocational experts; explore the possibility of a psychological explanation for some of the claimants' impairments; or properly evaluate the evidence presented. Based on these flaws in the ALJs' methodologies, the district court remanded the cases to the Secretary for further proceedings, without suggesting the Secretary's positions were unreasonable. On

remand, the Secretary awarded benefits to each claimant.

Before we can address the merits of the claimants' appeals, we must decide whether we have subject matter jurisdiction. A party seeking an award of attorney's fees under EAJA must file a fee application "within thirty days of final judgment in the action." 28 U.S.C. § 2412(d)(1)(B) (1988). We lack jurisdiction to consider the merits of fee applications filed beyond this time limit. *Olson v. Norman*, 830 F.2d 811, 821 (8th Cir. 1987). The parties agree that sentence four of 42 U.S.C. § 405(g) governs their cases. Thus, the Secretary argues the claimants' appeals are untimely because the claimants filed their fee applications more than ninety days after the district court remanded the claimants' cases to the Secretary for further proceedings. *See Melkonyan v. Sullivan*, —— U.S. ——, 111 S.Ct. 2157, 2165, 115 L.Ed.2d 78 (1991). We disagree.

We think the Secretary misconstrues the district court's orders. Without dictating the claimants should receive benefits, the district court returned the cases to the Secretary for further administrative proceedings because the Secretary committed legal and factual errors in evaluating their claims. In our view, the district court's orders are not final "judgment[s] . . . modifying or reversing the decision[s] of the Secretary." 42 U.S.C. § 405(g) (1988) (sentence four); *see Sullivan v. Hudson*, 490 U.S. 877, 109 S.Ct. 2248, 2255, 104 L.Ed.2d 941 (1989). We believe the district court retained jurisdiction of the claimants' cases and planned to enter dispositive sentence four judgments after the Secretary reevaluated the claimants' applications for benefits. *See Hudson*, 109 S.Ct. at 2254-55;

Robertson v. Sullivan, 925 F.2d 1124, 1125-26 (8th Cir.1991); *Taylor v. Heckler*, 778 F.2d 674, 677 n. 2 (11th Cir.1985). This view is supported by the fact the claimants did not become prevailing parties eligible for attorney's fees until the Secretary reevaluated their cases and awarded them benefits. *Hudson*, 109 S.Ct. at 2254-55. Because the parties did not report to the district court after the Secretary awarded benefits to the claimants, no final judgments have been entered. Nevertheless, the district court ruled on the claimants' fee applications. We see no useful purpose in remanding the claimants' cases to the district court for entry of postremand judgments, and now turn to the merits of the appeals before us. *See Auke Bay Concerned Citizen's Advisory Council v. Marsh*, 779 F.2d 1391, 1393 (9th Cir.1986) (fee applications filed before final judgments are timely).

Under EAJA, courts must award attorney's fees to a prevailing social security claimant unless the Secretary's position in denying benefits was substantially justified. *See* 28 U.S.C. § 2412(d)(1)(A) (1988). The Secretary bears the burden of proving the denial of benefits was substantially justified. *Jackson v. Bowen*, 807 F.2d 127, 128 (8th Cir.1986) (per curiam). To establish substantial justification, the Secretary must show the denial had a reasonable basis in law and fact. *Pierce v. Underwood*, 487 U.S. 552, 565-66, 108 S.Ct. 2541, 2550-51, 101 L.Ed.2d 490 (1988). This means the Secretary's position need only be "justified to a degree that could satisfy a reasonable person" to defeat a claimant's application for attorney's fees. *Id.* at 565, 108 S.Ct. at 2550. We review the district court's decision that the Secretary's position was substantially justified for abuse of discretion. *Id.* at 563, 108 S.Ct. at 2549.

The claimants contend they are entitled to attorney's fees based on the district court's holding that the Secretary's decisions to deny their claims were not supported by substantial evidence. Essentially, the claimants equate the substantial evidence and substantial justification standards, making a fee award automatic when a claimant wins a contested claim for benefits. This contention is misplaced. *Brouwers v. Bowen*, 823 F.2d 273, 275 (8th Cir.1987) (per curiam); *Jackson*, 807 F.2d at 128-29; *see also Pullen v. Bowen*, 820 F.2d 105, 108 (4th Cir.1987).

The district court correctly recognized that "fees are not be awarded just because the Secretary [loses a] case." *Brouwers*, 823 F.2d at 275. The Secretary's position in denying benefits can be substantially justified even if the denial is unsupported by substantial evidence on the record as a whole. *See id.*; *Jackson*, 807 F.2d at 128-29. This is so because the substantial evidence and substantial justification standards are different. *Jackson*, 807 F.2d at 128-29; *Broussard v. Bowen*, 828 F.2d 310, 311-12 (5th Cir.1987); *Pullen*, 820 F.2d at 108; *Federal Election Comm'n v. Rose*, 806 F.2d 1081, 1087 (D.C.Cir.1986); *Couch v. Secretary of Health & Human Servs.*, 749 F.2d 359, 360 (6th Cir.1984) (per curiam). Under the substantial evidence standard, the district court must consider evidence that both supports and detracts from the Secretary's position. *Clarke v. Bowen*, 843 F.2d 271, 272 (8th Cir.1988). In contrast, under the substantial justification standard the district court only considers whether there is a reasonable basis in law and fact for the position taken by the Secretary. *Pierce*, 487 U.S. at 559, 108 S.Ct. at 2547; *Broussard*, 828 F.2d at 312. Because the standards are "neither semantic nor legal equivalents," *Broussard*, 828 F.2d

at 311, the Secretary can lose on the merits of the disability question and win on the application for attorney's fees, *id.* at 312.

Keeping these principles in mind, we turn to the record to determine whether the district court abused its discretion in holding the Secretary's position was substantially justified. If the Secretary was reasonable in denying the claimants' claims for benefits, the Secretary's position was substantially justified and the claimants are not entitled to attorney's fees. Having reviewed the record in each of the claimant's cases, we believe "at least one permissible view of the evidence" shows a reasonable basis in law and fact for the Secretary's position that the claimants were not entitled to benefits. *Jackson*, 807 F.2d at 130. The Secretary relied on opinions of treating physicians, contradictory evidence of pain and limitations, and inconsistent evidence of the claimants' activities to support the denial of benefits in the claimants' cases. Like the district court, we recognize the cases were close. Closeness itself is evidence of substantial justification. *Id.* at 129-30 (citing *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1389 (3d Cir.), *cert. denied*, 474 U.S. 919, 106 S.Ct. 246, 88 L.Ed.2d 255 (1985)). Because the district court did not abuse its discretion in holding the Secretary's position was substantially justified, the district court properly denied the claimant's applications for attorney's fees under EAJA.

Accordingly, we affirm.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civ. 3-88-71

RICHARD H. SCHAEFER, PLAINTIFF

v.

LOUIS W. SULLIVAN, M.D., Secretary of Health and Human Services, DEFENDANT

[Filed Aug. 26, 1991]

ORDER AND MEMORANDUM

Before the Court are defendant's objections to the May 9, 1991 Report and Recommendation issued by Magistrate Judge J. Earl Cudd.

Based on the file, record and arguments of counsel, IT IS HEREBY ORDERED that plaintiff's counsel is awarded SSA attorney fees of $2,287.50 pursuant to 42 U.S.C. § 106(b)(1) and that plaintiff and his counsel are awarded EAJA attorney fees of $1,372.50 pursuant to 28 U.S.C. § 2412, subject to counsel for plaintiff refunding to plaintiff the lesser of these two fees, $1,372.50.

DATE: August 23, 1991

/s/ Robert G. Renner
ROBERT G. RENNER
United States District Judge

MEMORANDUM

In this Social Security disability case, the Court issued an order on April 4, 1989 stating "that the Secretary's decision denying disability insurance benefits to plaintiff is reversed, that the parties' cross motions for summary judgment are denied, and that the case is remanded to the Secretary for further consideration in light of this Order." On January 31, 1990, an administrative law judge (ALJ) issued a decision in plaintiff's favor which became the final decision 60 days later because it was not reviewed by the Appeals Council. An award certificate was issued on June 12, 1990. Plaintiff filed his petition for attorney's fees on July 17, 1990. The Equal Access to Justice Act, § 2412(d)(1)(B), states that a prevailing party must file for attorney's fees "within thirty days of final judgment in the action." The government argued that the petition should be denied because it was not filed within thirty days of the date on which it became final. The Magistrate Judge recommended that the Court award attorneys' fees pursuant to EAJA. He concluded that a final judgment had not been issued in the case and the petition was therefore timely.

In a recent opinion, *Melkonyan v. Sullivan*, No. 90-5538 (June 10, 1991), the United States Supreme Court clearified what constitutes such a "final judgment" by stating that only the court, not the Secretary or the Appeals Counsel, could enter a final judgment for purposes of EAJA. In his objections to the Report and Recommendation, the Secretary argues that the EAJA fee petition is untimely because the

relevant decision by the court was the remand order of April 4, 1989.[1]

In *Melkonyan*, the Supreme Court considered whether any remand orders by a court could be considered final judgments for purposes of EAJA. It stated:

> we conclude that in Sec. 405(g) actions, remand orders must either accompany a final judgment affirming, modifying or reversing the administrative decision in accordance with sentence four [of 42 U.S.C. § 405(g)], or conform with the requirements outlined by Congress in sentence six. Construing remand orders in this manner harmonizes the remand provisions of Sec. 405(g) with the EAJA requirement that a "final judgment" be entered in the civil action in order to trigger the EAJA filing period. 28 U.S.C. § 2412 (d)(1)B). In sentence four cases, the filing period begins after the final judgment ("affirming, modifying, or reversing") is entered by the court and the appeal period has run, so that the judgment is no longer appealable. *See* Sec. 2412 (c)(2)(G). In sentence six cases, the filing period does not begin until after the postremand proceedings are completed, the Secretary returns to court, and court enters final judgment, and the appeal period runs.

The Secretary characterizes the remand at issue here as a sentence four remand requiring filing by July 3, 1989, 30 days following the end of the appeal period.

Plaintiff argues that since the remand included a denial of *both* parties' motions for summary judg-

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[1] The Secretary does not object to the award of fees pursuant to the Social Security Act.

ment, the April 4, 1989 order was not a final judgment pursuant to sentence four, and that no final judgment had yet been entered by the Court based on the ALJ's award of benefits.

The Eighth Circuit has recently considered similar facts in *Welter v. Sullivan*, Nos. 90-2559SI, 90-2725SI, 90-2836SI, 1991 WL 149701 (August 9, 1991). The panel stated:

> Without dictating the claimants should receive benefits, the district court returned the cases to the Secretary for further administrative proceedings because the Secretary committed legal and factual errors in evaluating their claims. In our view, the district court's orders are not final "judgment[s] . . . modifying or reversing the decision[s] of the Secretary." 42 U.S.C. § 405 (g) (1988) (sentence four); *see Sullivan v. Hudson*, 109 S.Ct. 2248, 2255 (1989). We believe the district court retained jurisdiction of the claimants' cases and planned to enter dispositive sentence four judgments after the Secretary reevaluated the claimants' applications for benefits. [citations omitted]. This view is supported by the fact that claimants did not become prevailing parties eligible for attorney's fees until the Secretary reevaluated their cases and awarded them benefits. *Hudson*, 109 S.Ct. at 2254-55. Because the parties did not report to the district court after the Secretary awarded benefits to the claimants, no final judgments have been entered.

Id. The Court is of the opinion that *Welter* is dispositive of the case before it. Because no final judgment has been entered, plaintiff's petition for attorneys' fees pursuant to EAJA is timely.

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil 3-88-71

RICHARD SCHAEFER, PLAINTIFF

v.

LOUIS SULLIVAN, M.D., Secretary of Health and Human Services, DEFENDANT

[Filed May 9, 1991]

REPORT AND RECOMMENDATION

Before the Court are petitions for attorney fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, and Social Security Act (SSA), 42 U.S.C. § 406. Both petitions request attorney fees for services rendered in Plaintiff's successful appeal to the District Court from the Secretary's denial of Social Security disability benefits. This matter has been referred to the undersigned United States Magistrate Judge for Report and Recommendation in accordance with 28 U.S.C. § 636 and Local Rule 72.1 (c). For the following reasons, the undersigned recommends that counsel for Plaintiffs be awarded

$1,372.50 under the EAJA and $2,287.50 pursuant to 42 U.S.C. § 406(b)(1), along with $120.00 for the filing fee in this case.

BACKGROUND

Plaintiff filed his application for Disability Insurance Benefits (DIB) on June 27, 1986, due to a back impairment, lung surgery and high blood pressure commencing on February 2, 1985. His application was denied initially and upon reconsideration. An administrative hearing was held on April 8, 1987, before Administrative Law Judge (ALJ) Morton J. Goustin. On September 18, 1987, the ALJ issued his decision finding Plaintiff not disabled and, therefore, ineligible for benefits. The Appeals Council denied Plaintiff's request for review and the ALJ's decision became the final decision of the Secretary.

Plaintiff appealed this decision to this Court by filing his complaint on February 9, 1988. *See* Complaint, Docket No. 1. On March 8, 1988, Defendant filed an answer and transcript. *See* Answer, Docket No. 3. On May 9, 1988, Plaintiff filed a motion for summary judgment. *See* Motion, Docket No. 4. Defendant filed a motion for summary judgment on May 9, 1988. *See* Motion, Docket No. 5.

In a Report and Recommendation dated October 19, 1988, the undersigned recommended that the Secretary's decision denying benefits be reversed; that the cross-motions for summary judgment be denied; and that the case be remanded to the Secretary for further consideration. *See* Report, Docket No. 6. On April 5, 1989, United States District Judge Robert G. Renner adopted the undersigned's Report and Recommendation and ordered the same. *See* Order, Docket No. 9.

On July 18, 1990, Plaintiff filed petitions for attorney fees under the EAJA and SSA. *See* Motion, Docket No. 10. Defendant filed an objection to Plaintiff's SSA fee petition with this Court on August 6, 1990. *See* Objection, Docket No. 13. Defendant filed objections to Plaintiff's EAJA petition on August 20, 1990. *See* Objections, Docket No. 14.

DISCUSSION

EAJA Attorney Fees

The EAJA provides in pertinent part:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances makes an award unjust.

28 U.S.C. § 2412(d)(1)(A). It is well established that the EAJA applies to the Social Security Act. *See Cornella v. Schweiker*, 728 F.2d 978, 987 (8th Cir. 1984). Under the EAJA, a prevailing party may be awarded attorney fees only when the position of the United States was not substantially justified. *Id.* at 981; *Cook v. Heckler*, 751 F.2d 240, 241 (8th Cir. 1984). The burden is on the government to prove that its position was substantially justified. *Cornella v. Schweiker*, 728 F.2d at 981-82; *Foley Constr. Co.*

v. United States Army Corps of Eng'r., 716 F.2d 1202, 1204 (8th Cir. 1983) (Citations omitted); *United States for Heydt v. Citizens State Bank*, 668 F.2d 444 (8th Cir. 1982).

Furthermore, a petition under the EAJA must be filed "within thirty days of the final judgment in the action." 28 U.S.C. § 2412(d)(1)(B). Defendant contends that Plaintiff's fee petition was not timely filed as required under the statute and, therefore, this Court lacks jurisdiction to consider the application. Defendant argues that the Appeals Counsel issued a final decision on January 31, 1990, finding Plaintiff disabled. *See Melkonyan v. Heckler*, 895 F.2d 556, 558 (9th Cir. 1990); *Jabaay v. Sullivan*, 920 F.2d 472, 474-75 (7th Cir. 1990). This Court finds, however, that the Appeal Council's final decision is not a final judgment under the EAJA. *See Sullivan v. Hudson*, 109 S. Ct. 2248, 2255 (1989) (Remanding court continues to retain jurisdiction over an action within the meaning of the EAJA, and may exercise that jurisdiction to determine if its legal instructions on remand have been followed by the Secretary.); *Keasler v. United States*, 766 F.2d 1227, 1229-31 (8th Cir. 1985) (EAJA 30 day period to apply for attorney fees begins to run only upon completion of all appellate proceedings or upon expiration of the time to appeal.). To date, a final judgment has not been entered in this case. Plaintiff's petition for attorney fees under the EAJA is therefore timely and this Court retains jurisdiction to consider the application.

Plaintiff received an Award Certificate from the Social Security Administration dated June 12, 1990. Plaintiff is, therefore, entitled to recover reasonable attorney fees under the EAJA if the government's

position was not substantially justified. *See Cornella v. Schweiker*, 728 F.2d at 981; *Cook v. Heckler*, 751 F.2d at 241. The ALJ failed to apply the *Polaski* criteria to evaluate Plaintiff's complaints of pain. Furthermore, the ALJ's credibility determinations were not supported by substantial evidence on the record as a whole. Finally, the ALJ's finding that Plaintiff was capable of returning to his past work was not supported by substantial evidence on the record as a whole. The Secretary's position, therefore, was not substantially justified. The Eighth Circuit in *Kelly v. Bowen*, 862 F.2d 1333, 1334 (8th Cir. 1988) impliedly found that when the government disregards the established law of the Circuit, there is no substantial justification for such action and an award of attorney fees under the EAJA is appropriate. Plaintiff is, therefore, entitled to recover reasonable attorney fees under the EAJA.

The EAJA provides that:

> . . . the amount of fees awarded under this subsection shall be based upon the prevailing market rates for the kind and quality of services furnished, except that . . . (ii) attorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.

28 U.S.C. § 2412(d)(2)(A). In determining a reasonable fee a court may also consider the factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) and adopted in the Eighth Circuit in *Allen v. Amalgamated Transit Union, Local 788*, 554 F.2d 876 (8th Cir.), *cert. denied*, 434 U.S. 891 (1977). This Court has examined Plaintiff's motion and supporting documents in

which Counsel states that he expended 18.30 hours representing Plaintiff before this Court. This Court finds the total number of hours claimed to be reasonable.

In *Kelly v. Brown*, 862 F.2d 1333, 1336 (8th Cir. 1988), the Eighth Circuit Court of Appeals held that upon proper proof, a court may increase the $75.00 per hour rate for attorney fees authorized by the EAJA to reflect the increase in the cost of living since October 1, 1981. In his petition, Plaintiff's Counsel requests $87.68 per hour for services rendered. Plaintiff, however, has failed to provide sufficient evidence to justify an increase in the fee. Therefore, this Court finds that the proper rate for Counsel's services in this matter would be $75.00 per hour. A reasonable award of attorney fees under the EAJA for 18.30 hours of service would be $1,372.50.

Plaintiff also requests $120.00 in costs for filing fees. *See* 28 U.S.C. § 2412(a). This Court finds Plaintiff's request to be reasonable and concludes such costs should be granted. *See Cotter v. Bowen*, 879 F.2d 359, 361 (8th Cir. 1989).

SSA Attorney Fees

An attorney who successfully represents a Social Security claimant in proceedings before the district court may apply for reasonable attorney fees pursuant to § 406(b)(1), which provides:

> Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Secretary may, notwithstanding the provisions of section 405(i) of this title, certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits.

Such an award of fees is discretionary with the court. *See Cotter v. Bowen*, 879 F.2d 359, 361 (8th Cir. 1989). The district court is in the best position to evaluate counsel's services and fee request as the court had the opportunity to observe counsel's representation first-hand. *Id.*

In evaluating an attorney's request for fees in a social security case, the Eighth Circuit in *Cotter* has laid down an expansive three part procedure. First, a court must calculate the lodestar rate. *Cotter v. Bowen*, 879 F.2d at 364. This is done by reference to the twelve factors enumerated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974).[1] *Id.* Second, a court must return

[1] The twelve Johnson factors are:

(1) the time and labor required;
(2) the novelty and difficulty of the questions;
(3) the skill requisite to perform the legal service properly;
(4) the preclusion of employment by the attorney due to acceptance of the case;
(5) the customary fee;
(6) whether the fee is fixed or contingent;
(7) time limitations imposed by the client or circumstances;
(8) the amount involved and the results obtained;
(9) the experience, reputation, and ability of the attorneys;
(10) the "undesirability" of the case;
(11) the nature and length of the professional relationship with the client; and
(12) awards in similar cases.

to the *Johnson* factors to determine if an upward or downward departure from the lodestar rate is warranted by the particular case. *Id.* Third, a court must balance the § 406 goal of preventing "too great a reduction in a claimant's already inadequate stipend" against the § 406 goal of promoting "adequate representation of potentially disabled individuals through a reasonable attorney's fee." *Cotter v. Bowen*, 879 F.2d at 365. Finally, the Eighth Circuit noted that "Specific findings should be made on the weight being assigned in determining a 'reasonable hourly rate.'" *Id.*

Turning to the lodestar rate, "courts most often turn first to the requesting attorney's own hourly rate in non-contingency fee cases or to the rates charged in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Cotter v. Bowen*, 879 F.2d at 364. Counsel seeks $125 per hour. The rate usually sought and allowed in the community is $125 per hour. *See* Report and Recommendation, *Arriola v. Sullivan*, Civ. No. 4-88-449 (D. Minn. 1990); Report and Recommendation, *Miller v. Bowen*, Civ. No. 4-87-1000 (D. Minn. 1989); *see generally Cotter v. Bowen*, 879 F.2d 359 (8th Cir. 1989).

An examination of the *Johnson* factors supports a lodestar rate of $125 per hour. Counsel expended 18.30 hours in representing Plaintiff. This Court finds that the time and labor required were not unusual.

This case involved Disability Insurance Benefits. After reviewing the record, this Court finds that this case was neither novel nor exceptionally difficult. Likewise, this case did not require extraordinary skill to perform the legal service properly.

This Court notes that Counsel expended 18.30 hours in representing Plaintiff. Such an expenditure of time would not seem to have a significant preclusive effect on other employment. Any expenditure of time negates the possibility of otherwise utilizing that same time period. The mere possibility that an attorney could have been otherwise occupied does not merit a conclusion that they were precluded from other employment absent specific proof.

Based upon other awards, the customary fee for this type of representation is approximately $125 per hour. *See supra*. Counsel did undertake some risk by operating on a contingent fee basis, being paid out of Plaintiff's past-due benefits. However, the state of the record indicates that the risk was minimal. Plaintiff had a good case and Counsel brought it to a successful conclusion. The case required the skill, competence and diligence of any attorney in a similar situation.

As discussed *supra*, the time involved in Counsel's representation was not preclusive of other employment. There appears to have been no time limitations imposed by the client nor by the circumstances. These factors are accordingly given little weight.

The amount involved was significant. Plaintiff recovered past-due benefits. From Plaintiff's perspective, Counsel obtained excellent results. This Court notes that Counsel's services were effective and obtained a significant recovery for Plaintiff. Counsel is an experienced practitioner. His reputation is a good one and his ability is not questioned.

Compared to other types of cases, all social security cases are undesirable due to the generally limited recoveries and the limit on attorney fees. This Court recognizes this and it forms a substantial element in

this Court's fee analysis. However, when Counsel accepts a social security case he or she does so in full understanding of the nature and limits of the representation. The inherent undesirable elements of social security cases must be recognized but differentiated from social security cases that are undesirable for reasons that transcend the inherent nature of all such cases. Only the latter cases justify consideration as undesirable. This Court finds that this case was not undesirable.

This Court recognizes that Counsel has represented Plaintiff for some time and that such representation has involved substantial litigation. Counsel is to be commended for his efforts on behalf of Plaintiff and this Court accords this factor due weight.

The final *Johnson* factor to be considered concerns awards in similar cases. This Court finds that an award of $2,287.50 is generally consistent with awards in similar cases. *See supra*. In, sum this Court finds that a *Johnson* factor analysis support's a finding of $125 per hour. This Court accordingly finds $125 per hour to be the appropriate lodestar rate.

This Court next considers whether any upward or downward departure from the lodestar rate is justified based upon the *Johnson* factors discussed *supra*. This Court notes that "Plaintiff's counsel bears the burden of showing the reasonable hourly rate thus adopted must be further enhanced to constitute a 'reasonable fee.'" *Cotter v. Bowen*, 879 F.2d at 364 (Citing *Blum v. Stenson*, 465 U.S. 886, 898 (1984). This Court finds that Counsel has not meet [sic] his burden to show that the lodestar should be enhanced and that an analysis of the *Johnson* factors do not justify such a departure.

The time and labor involved in this case were not unusual. The case was not novel, particularly difficult or undesirable. No extraordinary skill was needed and the preclusive effect of accepting the representation was minimal. There were no time limitations imposed upon Counsel beyond those associated with any case and the lodestar rate and awards in similar cases are equivalent with customary norms. *See supra*. These factors shape this Court's decision.

This Court acknowledges Counsel's ability *supra* and that he has undertaken to represent Plaintiff over a substantial period of time with some risk. Counsel has also proven effective in obtaining substantial relief for his client. However, the relatively straightforward nature of this case leads this Court to determine that no enhancement of the lodestar rate is justified. "While the results achieved were very good, . . . this is not the 'rare case' where the results were 'exceptional' and the service rendered surpassed that which would be expected in light of the hourly rate awarded." *Cotter v. Bowen*, 879 F.2d at 364.

Balancing the joint purposes of § 406, does not change this Court's calculus. Counsel will receive a fee comparable to that awarded for similar work and one that should adequately renumerate him for his time and provide an incentive for similar work in the future. At the same time this Court's award will provide Plaintiff with the lion's share of his recovery. *See Gowen v. Bowen*, 855 F.2d 613, 619 (8th Cir. 1988). This Court's award is thus fair and equitable to both parties. This Court finds the lodestar rate to be $125 per hour. As Counsel worked 18.30 hours representing Plaintiff, this Court finds the reasonable compensation due Counsel to be $2,287.50.

Offset of SSA and EAJA Fees

Numerous federal courts have awarded both SSA and EAJA attorney fees in Social Security cases. *See Guthrie v. Schweiker*, 718 F.2d 104 (4th Cir. 1983); *Meyers v. Heckler*, 625 F. Supp. 228 (S.D. Ohio 1985); *Eustache v. Secretary of HHS*, 601 F. Supp. 176 (E.D.N.Y. 1985). To avoid a double recovery of fees by an attorney, courts have generally required counsel to reimburse their clients from the EAJA award "up to the amount awarded under 42 U.S.C. § 406(b)(1) . . . ." *Guthrie v. Schweiker*, 718 F.2d at 108 n.11 (Cited with approval in *Brissette v. Heckler*, 784 F.2d 864, 865 n.1 (8th Cir. 1986)); *see also Eustache v. Secretary of HHS*, 601 F. Supp. at 178. Applying the award of the EAJA fees payable to the Plaintiff's past-due benefits will increase the net benefits received by the Plaintiff. This Court is persuaded that this offset method comports with the purposes of both the EAJA and the SSA.

RECOMMENDATION

IT IS HEREBY RECOMMENDED that based upon the foregoing reasons Plaintiff's counsel be awarded SSA attorney fees of $2,287.50 pursuant to 42 U.S.C. § 406(b)(1); and that Plaintiff and his counsel be awarded EAJA attorney fees of $1,372.50 pursuant to 28 U.S.C. § 2412, subject to counsel for Plaintiff refunding to Plaintiff the lesser of these two fees, $1,372.50.

/s/ Earl Cudd
HON. J. EARL CUDD
United States Magistrate Judge

Dated: May 9, 1991

Pursuant to Local Rule 72.1(c) any party may object to this Report and Recommendation by filing with the Clerk of the Court, and serving all parties within ten (10) days, a writing which specifically identifies those portions of this Report to which objections are made and the basis of those objections. Failure to comply with this procedure shall operate as a forfeiture of the objecting party's right to seek review in the Court of Appeals.

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-88-71

RICHARD H. SCHAEFER, PLAINTIFF

v.

OTIS R. BOWEN, M.D., Secretary of Health and Human Services, DEFENDANT

[Filed Apr. 4, 1989]

ORDER

Before the Court are defendant's objections to the Report and Recommendation of United States Magistrate J. Earl Cudd dated October 19, 1988. Magistrate Cudd recommended that the decision of the Administrative Law Judge ("ALJ") denying plaintiff disability insurance benefits under the Social Security Act, 42 U.S.C. secs. 416(i) and 423, be reversed and remanded for reevaluation by the Secretary of Health and Human Services ("Secretary").

The Magistrate concluded that such a remand was necessary for three reasons. First, the Magistrate found that the ALJ failed to evaluate plaintiff's subjective complaints of incapacitating pain in accordance with *Polaski v. Heckler*, 751 F.2d 943, 948 (8th Cir. 1984). Second, the Magistrate found that the ALJ did not properly analyze plaintiff's back injuries. Third, the Magistrate concluded that the ALJ's residual functioning capacity assessment of plaintiff's ability to engage in past relevant work was not supported on the record as a whole by the medical evidence.

After a *de novo* review of the matter, and upon consideration of the memorandum of the parties, and the entire record of the case, the Court hereby adopts the Report and Recommendation of Magistrate J. Earl Cudd dated October 18, 1988. Accordingly, IT IS HEREBY ORDERED that the Secretary's decision denying disability insurance benefits to plaintiff is reversed, that the parties' cross motions for summary judgment are denied, and that the case is remanded to the Secretary for further consideration in light of this Order.

DATED: April 4, 1989.

/s/ Robert G. Renner
ROBERT G. RENNER
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-88-71

RICHARD H. SCHAEFER, PLAINTIFF

v.

OTIS R. BOWEN, Secretary of Health & Human Services, DEFENDANT

[Filed Oct. 19, 1988]

REPORT AND RECOMMENDATION

Plaintiff, Richard H. Schaefer, seeks judicial review of the final decision of the Secretary of Health and Human Services (Secretary) denying his application for disability insurance benefits under the Social Security Act. 42 U.S.C. §§ 416(i) and 423. This Court has jurisdiction to review the Secretary's decision. *Id.* at § 405(g).

On June 27, 1986, plaintiff filed his application alleging disability commencing February 2, 1985, due to a back impairment, lung surgery and high blood pressure. A hearing was held on April 8, 1987, before Administrative Law Judge (ALJ) Morton Goustin

in Minneapolis, Minnesota. The ALJ issued his decision on September 18, 1987, finding plaintiff not disabled, and accordingly ineligible for benefits. The Appeals Council denied plaintiff's request for review and adopted the ALJ's decision as the final decision of the Secretary.

Before the Court are cross-motions for summary judgment. The issue on appeal is whether the Secretary's decision is supported by substantial evidence. After reviewing the record in its entirety, the Court finds the following errors preclude the existence of a record that is fully and fairly developed: plaintiff's subjective complaints of disabling pain were erroneously discredited; plaintiff's back condition was improperly analyzed; and the ALJ's residual functioning capacity (RFC) assessment for plaintiff's ability to engage in past relevant work is not supported by the medical evidence.

It is, therefore, recommended that the Secretary's decision be reversed and the case remanded for further evaluation in accordance with this opinion.

BACKGROUND

The record overall shows plaintiff suffers from chronic degenerative changes of the cervical and lumbar spine; post status cervical fusion at C-5, 6; a prior lung surgery; high blood pressure; and dry eye syndrome.

At the time of the hearing, plaintiff was 57 years old, 5'9" and weighed approximately 190 pounds. (T. 30-1)[1] Plaintiff resided with his wife in Austin, Minnesota. (T. 32) Formal education was completed

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[1] "T." followed by page number denotes reference to the certified transcript of record.

through the eighth grade; however, plaintiff received his G.E.D. (T. 33-4) Plaintiff did not pursue subsequent vocation training or college course work.

Plaintiff has not engaged in substantial gainful activity since February 2, 1985. (T. 17; Finding No. 2) No subsequent work attempts are found. Prior work experience includes employment as an elected business agent for a union and meat cutter. (T. 36-7, 74) The ALJ found plaintiff had a RFC to perform work activities, except those involving prolonged periods of maintaining one position and lifting over 20 pounds. (T. 16; Finding No. 5) Accordingly, plaintiff was found capable of engaging in past relevant work as a business agent. (*Id.*; Finding No. 6)

Physical limitations of plaintiff include lifting no more than 10 to 15 pounds infrequently; the need to alternatively walk, stand and sit; sitting no longer than ¾ hour continuously; limited ability to flex and extend the neck; decreased control of the right hand due to numbness; reading or watching tv no longer than 15 minutes at a time; no crawling, crouching or pushing/pulling. (T. 40, 43, 46, 80, 114, 137-8, 147-8) Disturbed sleeping 3 to 4 nights a week was also reiterated. (T. 46) Plaintiff stated he was unable to work as a business agent because of his inability to sit 80% of the workday and the necessity of doing paper work, which requires a great deal of reading and writing. (T. 43) In order to alleviate back pain, plaintiff lies down everyday in the afternoon for one hour. (T. 41)

Activities engaged in by plaintiff include walking on a daily basis with rests every ½ mile; driving an automobile, light cooking and household maintenance, and socializing. (T. 32, 44, 48-9, 69) Plaintiff and his wife took turns driving to the hearing. (T. 32)

No activities questionnaires were completed by friends or relatives.

The ALJ concluded that the medical evidence established a mild degenerative disease of the cervical and lumbar spine, and dry eyes. (T. 16; Finding No. 3) However, no medically recognized impairment was found. Plaintiff's past medical history includes an anterior cervical spine fusion at the level of C-5, 6 in 1969 after an automobile accident. Treating physician Dr. Paul Arnesen stated plaintiff had no difficulties post operatively until December 1984. (T. 118)

Plaintiff testified that he had injured his back at work when he slipped and fell on ice in the parking lot. (T. 34) This injury occurred on December 27, 1984, and caused immediate pain in plaintiff's back and neck. (T. 108)

Plaintiff's treating physician for his back and neck problems is chiropractor Dr. David Mjoen, who has seen plaintiff on an ongoing basis since December 28, 1984. Dr. Mjoen's notes indicate plaintiff sought medical treatment the day after his fall. (T. 111) Chief complaints included back distress in the bilateral and occipital regions, thoracic distress, paresthesia into the right arm and hand, as well as headaches. *Id.* Improvement was noted on February 4, 1985; however, plaintiff continued to have pain accompanied by headaches 4 times a week. *Id.* In March, left-sided cervical distress was also documented. (T. 110)

On April 26, 1985, plaintiff's diagnosis was an acute moderate traumatic cervical, dorsal and lumbar sprain with muscle spasm, myositis and radiculitis. (T. 106) Plaintiff was seen 3 times weekly at the time; treatment consisted of specific chiropractic adjustments. (T. 106-7) Plaintiff was released to return

to work with restrictions; however, Dr. Mjoen stated, ". . . there is no apparent job that would fit the restriction placed upon him." (T. 106) Activity restrictions included no crawling, reaching above shoulder level, pushing or pulling, carrying or lifting over 50 pounds. (T. 113-4) Dr. Mjoen opined:

> At this point in time his primary problem involves sitting for a great length of time, frerotating [sic] or flexing of the cervical spine which in turn would cause considerable irritation to the injured part of that area. His lifting and carrying should be kept within the above restrictions. I would expect this individual to be able to handle his job within these restrictions however at this point in time it is not advisable to return him to work with no restrictions at all for the simple reason that he is involved in too much heavy lifting and a lot of flexing and rotating of the cervical spine.

(T. 114) Permanent partial disability of 10.5% was concluded by Dr. Mjoen on April 29, 1985. (T. 112)

In May 1985, plaintiff's neck, mid back and low back distress had improved. (T. 117) However, Dr. Mjoen referred plaintiff to Dr. Paul Arneson for an evaluation in September 1985. (T. 115-6) Constant neck and lower back pain were plaintiff's chief complaints. (T. 118) No weakness in the upper extremities was found; minimal hyposthesia over the fourth and fifth fingers was noted; sensation in lower extremities was normal. (T. 120-2) An AP and lateral view of the dorsal spine revealed a straight dorsal spine and moderate hypertrophic degenerative changes

at all levels. (T. 123) Additionally, significant degenerative changes were found in the facet at L-5, S-1 on the left side, while minimal changes were noted on the right. *Id.* Dr. Arnesen's final diagnosis was solid bony fusion C5, 6; cervical disc syndrome; low back strain; and myositis of the trapezius muscle on the right. (T. 124) Recommended treatment included cervical traction, muscle relaxants, local heat and analgesics. *Id.*

Plaintiff was hospitalized from October 4, 1985, until October 9, 1985, for evaluation of his cervical disc syndrome. (T. 125) Chest x-rays showed the heart and great vessels to be normal, and the pulmonary parenohyma was unremarkable. (T. 126) Significant relief was obtained through physical therapy. (T. 125)

A cervical CT scan in November 1985 demonstrated mild degenerative narrowing of the C-4, 5 disc space; no other significant abnormalities were noted. (T. 130, 133, 135) In December 1985, Dr. Arneson's diagnosis included radiculitis, cervical right accompanied by instability of the cervical spine above the level of the fusion. (T. 133) Evidence of nerve root irritation and compression was present at level C-6, 7. (T. 134) Dr. Arneson opined, ". . . he is not capable of carrying out any type of effective work at the present time." (T. 133) A possible extension of plaintiff's existing fusion was suggested; however, plaintiff did not want surgical intervention at this time. (T. 134)

On January 31, 1986, Dr. Mjoen again reiterated that plaintiff could return to work with the previously mentioned restrictions. (T. 136) A poor prognosis for complete recovery was provided along with the following diagnosis:

1. Chronic recurrent cervical radiculitis complicated by recurrent fixations at the level of C-4, C-5, C-6 and C-7;

2. Chronic recurrent dorsal-lumbar sprain with associated radiculitis complicated by recurrent spinal fixations at the level of T-12, L-1, L-2, L-5, S-1.

Id. Furthermore, Dr. Mjoen concluded:

> I do feel that he should be able to improve from what he is now, however *I do not feel that he will ever be able to return to full time unrestricted work or the type of work that he has been doing in the past.* (emphasis added)

(T. 136) A functional capacities evaluation completed by Dr. Mjoen contained various restrictions such as no prolonged sitting; no bending, lifting or twisting of the dorso-lumbar spine; no continual rotation of the head up and down or from side to side; lifting and carrying no more than 35 pounds on an occasional basis. (T. 137-8)

The need for continual chiropractic treatment in order to avoid symptomatology was deemed paramount by Dr. Mjoen in May 1986. (T. 138) X-rays taken in August 1986 revealed moderate disc degeneration between C-4, 5, which restricted flexion and extension in both directions; a left convex lumbar curvature with narrowing of the disc spaces at level T-12, L-1 and L-1, 2; mild anterior spurring on bodies of L-1, 2, 3; and slight retrolesthesis of L-5, S-1. (T. 140)

Consulting orthopedic surgeon Dr. A. Lilly examined plaintiff on August 22, 1986. (T. 144-5) Plaintiff appeared anxious to procure some form of sedentary work. (T. 145) A poor prognosis for significant

future improvement was given due to the chronic degenerative changes in the cervical and lumbar spine. *Id.*

Dr. P. Gislason examined plaintiff in September 1986 on behalf of the Home Insurance Company. (T. 146-7) Plaintiff demonstrated good range of motion of the upper extremities and cervical motion was limited to 50% of normal. Again, it was surmised that plaintiff had reached maximum medical improvement. (T. 147) Further, plaintiff's pre-existing 1965 impairment was seen as an aggravating factor in his present condition. *Id.*

Dr. Allan Hagen saw plaintiff in the early part of 1987 for recurrent burning and soreness in both eyes. (T. 180) Reading, driving and watching TV continued to bother plaintiff. (T. 181-2) Dr. Hagen attempted to place silicone plugs in plaintiff's tear drain system; however, the problem was not alleviated. *Id.* An impression for dry eye syndrome was provided.

Dr. David Dines of the Mayo Clinic provided information concerning plaintiff's operation for wedge resection of the granuloma, which involved a thoracotomy that was performed by Dr. W. Payne on June 6, 1977. (T. 94) Plaintiff recovered well and no evidence of malignancy was noted. (T. 96) Pulmonary testing in September 1978 evidenced obstructive airways disease. (T. 104)

Vocational evaluations were completed by Dr. Frank Lamp in April 1987. (T. 166-79) Plaintiff's past history for high blood pressure was noted, but it appears to currently be controlled with medication. (T. 166) It is also significant to note that plaintiff had previously worked with the Karr Rehabilitation Services for three 90 day periods. *Id.* No appropriate jobs were found; placement potential was described

as "extremely poor." (T. 173) Plaintiff's verbal aptitude and intelligence was in the highest third exclusive of the top 10% of the population. (T. 172) Dr. Lamp concluded:

> Mr. Schafer is unable to function in any position related to a business agent for a union . . . He is of advanced age (age 57) which makes it extremely difficult to utilize the skills he has attained to transfer to a new vocational area.
>
> * * *
>
> It is therefore, my professional opinion . . . that Mr. Schaefer is not employable at this time, nor will he reach a level of becoming employable.

(T. 175)

RFC assessments were provided by nonexamining consulting physicians Alan Suddard, James Henry and Randall Norgard. (T. 88-94, 148-9) Dr. Suddard concluded ability to engage in past relevant work as a business agent; while Dr. Henry concluded an RFC for medium work modified for neck rotation and extension. (T. 89, 92) Dr. Norgard also found plaintiff capable of medium work with the before mentioned modification, as well as the physical ability to frequently climb, crouch, crawl, kneel and stoop; to sit for 6 hours during an 8 hour day; and unlimited pushing and pulling. (T. 148)

DISCUSSION

The ALJ's factual findings are conclusive if supported by substantial evidence on the record as a whole. *Gavin v. Heckler*, 811 F.2d 1195, 1199 (8th Cir. 1987). The Court distinguishes between mere substantial evidence and substantial evidence on the

record as a whole. *Id.* A more scrutinizing analysis is invoked by the latter. *Smith v. Heckler*, 735 F.2d 312, 315 (8th Cir. 1984). In reviewing an administrative decision, "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Universal Camera Corp. v. Nat'l Labor Relations Bd.*, 340 U.S. 474, 488 (1951) (Frankfurter, J.); *see also Brand v. Secretary*, 623 F.2d 523, 527 (8th Cir. 1980). Accordingly, the Court must apply a balancing test to evidence that is contradictory.

A number of errors transpired at the administrative level in the instant case. First, plaintiff's subjective complaints of incapacitating pain were improperly discredited. The ALJ did not evaluate plaintiff's complaints in accordance with *Polaski v. Heckler*, 751 F.2d 943, 948 (8th Cir. 1984). Although plaintiffs' medication, various activities and physical limitations were addressed; the ALJ failed to consider aggravating circumstances such as a preexisting back condition and spinal fusion; the opinions of treating physicians; and the duration, frequency and intensity of plaintiff's pain. The ALJ is entitled to discredit plaintiff based on inconsistencies found in the record; however, the opinions of treating physicians which are supported by medical evidence cannot be ignored. *Carpenter v. Heckler*, 733 F.2d 591, 593 (8th Cir. 1984). Medical notes consistently state constant neck and back pain due to degenerative changes.

Plaintiff's ability to do certain types of activities does not preclude a finding of disability. *See e.g., Nettles v. Schweiker*, 714 F.2d 833 (8th Cir. 1983) (short walks, watching TV and driving a car are not inconsistent with severe pain); *Klug v. Weinberger*, 514 F.2d 423 (8th Cir. 1975) (driving, walking

short distances, carrying packages and socializing are not evidence that plaintiff can work). Therefore, the mere fact that plaintiff walks 7 days a week, drives an automobile and socializes is insufficient to discredit plaintiff.

Recognized or acceptable medical evidence includes evidence from other practitioners, which expressly includes chiropracters. *See* 20 C.F.R. § 404.1513(e)(3) (1988). The ALJ states that claimant did not consult a medical doctor until several months after his fall. (T. 12) Plaintiff saw chiropractor Dr. Mjoen on December 28, 1984, or the day after he had fallen on the ice. (T. 111) Moreover, plaintiff continued to see Dr. Mjoen 3 times a week for several months. (T. 106) Dr. Mjoen eventually referred plaintiff to orthopedic surgeon Dr. Paul Arneson in September 1985 for consultation. (T. 115) As Dr. Arneson pointed out, plaintiff's condition may eventually necessitate surgical intervention should patient experience intractable pain that cannot be tolerated. (T. 134) Therefore, on remand the ALJ should consider more closely plaintiff's chiropractic treatment immediately after his accident.

Second, plaintiff's back pain was not given an individualized evaluation.

> A back condition may affect one individual in an inconsequential way, whereas the same condition may severely disable another person who has a greater sensitivity to pain or whose physical condition due to age, obesity, deformity, or general physical well-being is generally deteriorated.

Simonson v. Schweiker, 699 F.2d 426, 429 (8th Cir. 1983) (citations omitted). Plaintiff's advanced age coupled with his weight and moderate hypertrophic

degerative changes at all levels, (T. 123, 143-5), warranted a different analysis. Additionally, plaintiff testified that he needs to lie down everyday in the afternoon for one hour to alleviate his back pain. (T. 41)

Third, the ALJ's finding that plaintiff possessed the requisite RFC to engage in past relevant work as a union business agent is not supported by substantial evidence. *See Vahr v. Heckler*, 741 F.2d 177, 179 (8th Cir. 1984) (Secretary must establish through medical evidence a claimant's RFC). Treating physician Dr. Mjoen expressly opined, ". . . I do not feel that he will ever be able to return to full time unrestricted work or the type of work he has been doing in the past." (T. 136) Dr. Arneson also found plaintiff not capable of carrying out any type of effective work. (T. 133) Moreover, the functional restrictions imposed by Dr. Mjoen do not permit plaintiff to engage in sedentary work which would require extensive forward flexion of the neck as well as periods of prolonged sitting. Further, plaintiff's dry eye syndrome prevents him from performing work that requires extensive reading and writing. The opinions provided by nonexamining consulting physicians Suddard, Henry and Norgard do not provide sufficient evidence in support of the ALJ's RFC assessment. *See Turpin v. Bowen*, 813 F.2d 165, 171 (8th Cir. 1987) (the opinions of consulting physicians cannot constitute substantial evidence when contradicted by those of treating physicians).

Further, since pain was clearly at issue, plaintiff's ability to work should have been determined with the assistance of a vocational expert. *McCoy v. Schweiker*, 683 F.2d 1138, 1148 (8th Cir. 1982). The Secretary has failed to prove that there are jobs in the national

economy that realistically suit plaintiff's actual capabilities. *See e.g., Lewis v. Heckler*, 888 F.2d 1293 (8th Cir. 1987); *O'Leary v. Schweiker*, 710 F.2d 1384, 1342 (8th Cir. 1983) (plaintiff should be able to perform the necessary acts of a workday as found in the competitive conditions of the real world of work).

Finally, plaintiff's age, education and work experience become relevant in determining plaintiff's RFC. *See* 20 C.F.R. §§ 404.1560, 404.1563 and 404.1564. Plaintiff is a person of advanced age, with marginal education. *Id.* Of significance is the following:

> We consider that advanced age (55 or over) is the point where age *significantly affects* a person's ability to do substantial gainful activity. If you are severely impaired and of advanced age and you cannot do medium work . . . you may not be able to do work unless you have skills that can be used in (transferred to) less demanding jobs which exist in significant members in the national economy. (Emphasis Added)

Id. at § 404.1563(d). The definition for medium work includes lifting up to 50 pounds with frequent lifting or carrying of objects weighing up to 25 pounds. 20 C.F.R. § 404.1567(c). Since plaintiff's physical limitations do not permit medium work, plaintiff's advanced age does become relevant. Moreover, Dr. Lamp's vocational evaluations evidence no transferable skills from plaintiff's past employment, as well as plaintiff's extremely poor potential to seek employment. *See* (T. 166-79).

RECOMMENDATION

Based on the foregoing, IT IS RECOMMENDED THAT the Secretary's decision denying disability insurance benefits to plaintiff be REVERSED; that the cross-motions for summary judgment be DENIED; and the case be REMANDED to the Secretary for further consideration.

Dated: Oct. 19, 1988

/s J. Earl Cudd
J. EARL CUDD
United States Magistrate

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